

unaided but with some difficulty and she had fairly marked difficulty in memory.

Chua J held S\$12,000 to be a proper award for epilepsy in addition to the S\$45,000 for the brain injury and loss of amenities. The epilepsy suffered by Tomi-nam was considered to be major. In our case the epi-
lepsy is not as serious and it is under control and can be controlled with medication.

Bearing in mind the parameters of the last three cases cited and the slightly less serious nature of the brain injury, the soft tissue injuries and the ensuing loss of amenities including the matter of the epilepsy as compared to those in the last two cases cited, I awarded \$60,000 as damages for pain, suffering and loss of amenities. This award is on the basis of full liability.

There was a request for an award for medication for the epilepsy but the evidence shows he received treat-
ment at a General Hospital and that supplies are obtain-
able from any General Hospital for free. I therefore did not award any sum.

As for the request for an award for nursing care for his epilepsy the evidence is that he does not require any nursing care and I did not award any sum.

For loss of earning capacity the multiplier was agreed at 24 years. What remained was how much the multipli-
cand should be. Counsel for the plaintiff requested for \$200 per month but I agreed with defence counsel that \$150 per month is more appropriate bearing in mind
that with his disabilities his chances of getting a job as a shop assistant earning \$300 to \$350 per month are better than his getting a clerical or other job earning about \$400 to \$500 per month. I therefore awarded \$43,200 on the basis of full liability.

The above general damages were awarded at 6% interest from date of service of writ to judgment and 8% thereafter. Special damages were agreed at \$450 with interest at 4% from date of accident. I ordered each party to bear its own costs.

Order accordingly.

Solicitors: Brijnandan Singh Bhar & Co; Francis Nathar & Co.

Reported by Azra Moiz

A Malakoff Bhd v Kuppusamy & Ors

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 16-07-88
KC VOHRAH J
15 AUGUST 1990

Labour Law — Termination of employment — Allegation of failure to comply with collective employment agreement — Claim for termination benefits — Whether collective agreement was superseded by subsequent award of the Industrial Court in another matter — Employment (Termination and Lay-off Benefits) Regulations 1980, reg 4(1)(a) — Industrial Relations Act 1967, s 17(2)

C The appellants, Malakoff Bhd, appealed against the Assistant Director of Labour's award of termination benefits to the 19 respondents whose services had been terminated. On 23 June 1986, the appellants gave the respondents a month's notice of termination on the grounds that the worker had attained or was past the retirement age of 55 years. It was not disputed that the parties had previously been bound by a collective agreement under which the respondents were assured employment until 30 September 1986. It was submitted for the respondents that as there was no clause in the collective agreement relating to age, they were entitled to termination benefits. The appellants argued that the respondents were governed not by the collective agreement but under Industrial Court Award 111 of 1986 (with retrospective effect from 1 September 1984) which stipulated the age of retirement as 55, and as the respondents were retired under this stipulation they were not entitled to termination benefits. When Malakoff Bhd refused to comply with the award, an action was commenced against them resulting in a consent award made in Industrial Court Award 146 of 1987 on 28 April 1987.

Held, dismissing the appeal with costs:

F (1) The consent award varied the terms of Award 111 of 1986 such that it would come into effect on 1 April 1987, instead of 1 September 1984 as set out in the award. As such the termination of the employees occurred before the coming into effect of Award 111 of 1986.

G (2) The appellants do not deny that they did not apply the articles in Award 111 of 1986 in respect of the estate where the respondents worked after the date of the award, though strangely, the appellants insist they applied the stipulation in the award as regards the retirement age. All the employees were paid according to the terms of the agreement; however, in respect of retirement the appellants relied on Industrial Court Award 111 of 1986.

H (3) Award 111 of 1986 which was supposed to have been implemented was not in force; the agreement that was in force and applied to them was the collective agreement which expired under its terms on 30 September 1986 but which continued till 31 March 1987, one day before the consent award came into force, consistent with s 17(2) of the Industrial Relations Act 1967. Thus the agreement was only superseded when Award 111 of 1986 came into effect.

I (4) With the agreement being in force on the date of termination, the court failed to see how the appellants could have selectively relied on one stipulation only in regard to the retirement age in the non-applicable Award 111 of 1986 to give termination letters to the 19 respondents. The agreement was silent on the age for retirement and therefore the 19 respondents were entitled to their claim for termination benefits payments.

[Bahasa Malaysia summary]

Malakoff Bhd sebagai perayu telah merayu terhadap keputusan oleh Penolong Pengarah Buruh yang memberi award ganjaran penamatan kepada 19 responden yang perkhidmatan mereka telah ditamatkan. Pada 23 Jun 1986, perayu telah memberi notis penamatan satu bulan atas alasan bahawa pekerja telah mencapai atau melampaui umur bersara, iaitu 55 tahun. Adalah tidak dipertikaikan bahawa pihak-pihak sebelum ini diikat oleh satu perjanjian kolektif yang menjamin pekerjaan kepada responden sehingga 30 September 1986. Pihak responden telah berhujah bahawa oleh sebab ketiadaan fasal di dalam perjanjian kolektif mengenai perkara umur, mereka berhak mendapat ganjaran penamatan. Pihak perayu pula berhujah bahawa responden tidak dikuasai oleh perjanjian kolektif. Sebaliknya, Award Mahkamah Perusahaan 111 tahun 1986 (dengan kesan retrospektif dari 1 September 1984) yang memperuntukkan umur bersara sebagai 55 tahun terpakai. Oleh sebab perkhidmatan responden ditamatkan di bawah peruntukan ini, mereka tidak berhak mendapat ganjaran penamatan. Apabila Malakoff Bhd enggan mematuhi award ini, satu tindakan telah dimulakan terhadap mereka yang berakhir dengan satu award persetujuan yang dibuat dalam Award Mahkamah Perusahaan 146 tahun 1987 pada 28 April 1987.

Diputuskan, menolak rayuan dengan kos:

(1) Award persetujuan telah mengubah terma Award 111 tahun 1986 dengan kesan ia akan berkuatkuasa pada 1 April 1987 dan bukannya 1 September 1984 seperti yang dinyatakan di dalam award. Oleh yang demikian, penamatan pekerja berlaku sebelum berkuatkuasanya Award 111 tahun 1986.

(2) Perayu tidak menafikan bahawa mereka tidak memakai perkara-perkara di dalam Award 111 tahun 1986 berkenaan dengan estet di mana responden bekerja selepas tarikh award. Namun demikian, perayu masih bertegas bahawa peruntukan award berkenaan umur bersara perlu dipakai. Semua pekerja dibayar mengikut terma perjanjian tetapi mengenai hal persaraan, perayu telah bergantung kepada Award Mahkamah Perusahaan 111 tahun 1986.

(3) Award 111 tahun 1986 yang sepatutnya dilaksanakan tidak berkuatkuasa; perjanjian yang berkuatkuasa dan terpakai untuk mereka ialah perjanjian kolektif yang tamat tempoh di bawah termanya pada 30 September 1986 tetapi telah dilanjutkan tempohnya sehingga 31 March 1987, iaitu satu hari sebelum award persetujuan berkuatkuasa. Ini adalah selaras dengan s 17(2) Akta Perhubungan Perusahaan 1967. Jadi, perjanjian kolektif hanya diatasi apabila Award 111 tahun 1986 berkuatkuasa.

(4) Oleh sebab perjanjian kolektif berkuatkuasa pada tarikh penamatan, mahkamah gagal memahami bagaimana perayu boleh bergantung kepada satu daripada peruntukan mengenai umur bersara di dalam Award 111 tahun 1986 yang tidak terpakai itu untuk memberi surat penamatan kepada 19 responden di dalam kes ini. Perjanjian kolektif tidak mempunyai sebarang peruntukan mengenai umur bersara dan oleh yang demikian 19 responden itu berhak menuntut supaya pembayaran ganjaran penamatan diberikan kepada mereka.]

Legislation referred to

Industrial Relations Act 1967 s 17(2)
Employment (Termination and Lay-off Benefits) Regulations 1980 reg 4(1)(a)

P Kuppusamy for the plaintiffs.

C Shanmugiah for the defendants.

Cur Adv Vult

A KC Vohrah J: This is an appeal against the decision of the Assistant Director of Labour, Sungei Petani made on 20 June 1988. He held that the 19 complainants (the respondents in this appeal) whose services were terminated by Malakoff Bhd (the appellants in this case) were entitled to termination benefits under the Employment (Termination and Lay-off Benefits) Regulations 1980.

B The 19 respondents were originally employees of Kew Man and Co Sdn Bhd ('Kew Man') and worked at Kuala Muda Estate, Sungei Petani. In 1983 Kew Man entered into a collective agreement ('the Kew Man agreement') with the National Union of Plantation Workers (NUPW) in which the 19 respondents together with other employees of the estate were members in benefit.

C Kew Man sold Kuala Muda Estate where the 19 respondents had their employment to Malakoff Bhd, the appellants, and the change of ownership took place on 15 February 1986.

D It is not disputed that on this date, 15 February 1986, the appellants offered continued employment to all former employees of Kew Man at Kuala Muda Estate including the 19 respondents without a break in service in the same capacity and on the same terms and conditions as set out in the Kew Man agreement. The 19 respondents accepted the offer and continued their service under the appellants with the Kew Man agreement governing their terms and conditions of service.

E The Kew Man agreement, when it was entered into between Kew Man and NUPW, was under cl 11(a), expressed to be for a period of three years from 1 October 1983 and 'thereafter, until superseded by a new agreement or terminated as provided herein'. In other words it was supposed to expire only on 30 September 1986 and if there was no new agreement the Kew Man agreement was to continue in force.

F On 23 June 1986, before the expiry of the Kew Man agreement, about four months after taking over the Kuala Muda Estate, the appellants issued to each of the 19 respondents one month's notice of termination of service either on the ground that the worker had attained or that he was past the retirement age of 55. And the 19 stopped work on 23 July 1986.

G The 19 respondents say that under the Kew Man agreement there is no clause relating to the age for retirement. That being so they argue that they are entitled to termination benefits payments under reg 4(1)(a) of the Employment (Termination and Lay-off Benefits) Regulations 1980 (PU(A) 338 of 1983) ('the Regulations') which reads:

... an employee shall be entitled to termination benefit payment where his contract of service is terminated for any reason whatsoever otherwise than —

- (a) by the employer, upon the employee attaining the age of retirement if the contract of service contains a stipulation in that behalf; . . .

The appellants, however, say that the respondents are governed by and are entitled to retirement benefits not under the Kew Man agreement but under Industrial Court Award 111 of 1986; and that art 44 of the award stipulates the age of retirement as 55 and that the 19 respondents were retired under the stipulation and therefore are not entitled to termination benefits. It is necessary, however, to give a background of Award 111 of 1986.

The appellants are with the Malayan Agricultural Producers Association (MAPA). A dispute between MAPA and NUPW was referred to the Industrial Court and was resolved by an award on 30 April 1986, Award 111 of 1986, with retrospective effect from 1 September 1984. The award binds both MAPA and NUPW. Malakoff Bhd, the appellants, comprised one of the companies which authorized MAPA to negotiate with NUPW. It has to be noted here that the dispute was referred to the Industrial Court on 5 February 1986 and the appellant made the offer of employment under the terms of the Kew Man agreement on 15 February 1986 with no reservation that the terms would be subject to the award by the Industrial Court in respect of the dispute referred to the court on 5 February 1986. In any event the appellants do not deny that they did not apply the articles in Award 111 of 1986 in respect of their employees in Kuala Muda Estate (where the 19 respondents worked) after the date of the award though, strangely, the appellants insist they applied the stipulation in the said award as regards the retirement age.

There is reference to Award 111 of 1986 in another award of the Industrial Court, Award No 146 of 1987 ('the consent award'), dated 28 April 1987 which is relevant to this case. This consent award applied Award 111 of 1986 to the employees of the Kuala Muda Estate as from 1 April 1987.

Paragraph 1 of the consent award is pertinent and is reproduced below:

Malayan Agricultural Producers Association (MAPA) and the National Union of Plantation Workers (NUPW) were the parties before the court in Award No 111 of 1986. Kuala Muda Estate, Sungei Petani, Kedah, (the estate) was bought over by Malakoff Bhd (the company) from Kew Man Co Sdn Bhd on February 1986. Malakoff Bhd is one of the companies which authorized MAPA to negotiate with NUPW and is listed in Appendices A1 and A2 of Award No 111 of 1986. Kew Man Co Sdn Bhd had a separate collective agreement with NUPW, on terms and conditions not as favourable as those in Award No 111 of 1986. *After the purchase, NUPW sought to upgrade the terms and conditions of work for its employees in the estate to those in Award No 111 of 1986. When the company refused to do so, NUPW filed a complaint of non-compliance on 11 March 1987. (Emphasis is mine.)*

A It will be noted from the above that the complaint of non-compliance by the appellants with Award 111 of 1986 was filed on 11 March 1987 and it will be remembered that the letters of termination purportedly based on art 44 of Award 111 of 1986 were sent on 23 June 1986 to the 19 respondents.

B The witness for the appellants at the enquiry, the manager of the Kuala Muda Estate, stated that from 1 February 1986 (when the appellants took over the estate) while all the employees of the estate were paid according to the terms of the Kew Man agreement, however, in respect of the retirement of the employees he relied on art 44 of Award 111 of 1986 which stipulates the retirement age as 55. In other words on 23 June 1986 when he issued the termination letters to the 19 respondents he relied selectively on art 44 of the said award, Award 111 of 1986, but not on the terms thereof relating to wages.

C He said the terms of the consent award which provided for 'the relevant provisions of Industrial Court Award 111 of 1986' to take effect from 1 April 1987 did not include art 44; it appears that what he meant is that the consent award took into account that art 44 of Award 111 of 1986 applied to the estate employees when the letters of termination were given.

D Now the relevant sub-paragraphs of para 2 of the consent award, Award 146 of 1987, do not so state or so imply. They read as follows (references in the award to 'company' and 'estate' are to the appellants and Kuala Muda Estate respectively):

F 2 Before us, NUPW and the company reached a settlement as follows:

- (i) The estate and NUPW will abide by the relevant provisions of Industrial Court Award No 111/1986 dated 30 April 1986 but with effect from 1 April 1987.
(ii) The NUPW recognizes and agrees that with the coming into force of this agreement, it will be necessary for consequential changes to be made by the estate to change the current practice followed in accordance with the expired memorandum of agreement between the National Union of Plantation Workers and Messrs Kew Man Co Sdn Bhd (Kuala Muda Estate and Foot-hills Estate), on rates of pay and other conditions of service for employees employed on the said estates.

G The terms set out above, to my mind, show that Award 111 of 1986 dated 30 April 1986 took effect retrospectively from 1 April 1987. The argument that para 2(i) refers to the implementation of 'relevant provisions' of the award with effect from 1 April 1987 and that the expression 'relevant provisions' does not include art 44 of Award 111 of 1986 stipulating the retirement age and that art 44 was already implemented before 1 April 1987 cannot hold water. As was adverted to earlier, the estate manager of the applicants gave evidence at the enquiry. He also stated that he participated in drawing up the agreement in the consent award and what was

meant by relevant provisions was as enumerated by him and which were provisions including Part III covering general and field workers and which had to be implemented from 1 April 1987. But Part III starts with art 23 and ends with art 48 and clearly art 44 relating to the age of retirement is within Part III. I fail to see how the manager can possibly state that art 44 was excluded from application. Award 111 of 1986 has terms relating not only to rubber tappers and to field and general workers but also to palm oil mill employees. Kuala Muda Estate has no palm oil mill and it seems clear that the expression 'relevant provisions' was put in to exclude those terms in Award 111 of 1986 relating to palm oil mill employees. My view is that sub-para (i) and (ii) of para 2 of the consent award reflect what was existing before it was made — that Award 111 of 1986 which was supposed to have been implemented was not in force for the employees of Kuala Muda Estate — and the agreement that was in force and applied to them was the Kew Man agreement which expired under its terms on 30 September 1986 but which continued till 31 March 1987, one day before the consent award came into force and this is consistent with s 17(2) of the Industrial Relations Act 1967; its continuance was in accordance with cl 11(a) as it states: 'This agreement shall take effect from 1 October 1983 and shall continue to remain in force for a period of three years and thereafter, until superseded by a new agreement . . .'. As of 1 April 1987, the date the Consent Award of 146 of 1987 took effect, the Kew Man agreement became superseded by Award 111 of 1986. I fail to see how with the Kew Man agreement being in force on the relevant date the appellants could have selectively relied on one stipulation only in regard to the retirement age in the non-applicable Award 111 of 1986 to give termination letters to the 19 respondents.

I do not see how it can be said that the enquiry officer erred when he made a finding that the Kew Man agreement applied to the 19 respondents. The said Kew Man agreement was silent on the age for retirement and therefore the 19 respondents were entitled to their claim for termination benefits payments under reg 4(i)(a) of the Regulations. The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *P Kuppusamy & Co; C Shanmugaiah & Co.*

Reported by *Azra Moiz*

A Khoo Cheng Huat v Public Prosecutor

HIGH COURT (PENANG) — CRIMINAL APPEAL NO 42 (52)-131-85
EDGAR JOSEPH JR J
21 JULY 1990

Criminal Law — Bribery and corruption — Soliciting — Accepting gratification — Prevention of Corruption Act 1961, s 4

Criminal Procedure — Conviction inconsistent with acquittal on another charge — Reliance on parts of evidence upon which accused acquitted

The appellant was charged with having solicited and accepted a gratification in his capacity as an inspector of Lembaga Padi dan Beras. The main evidence against the appellant was that of the complainant and his wife. The sessions judge acquitted the appellant of the charge of soliciting but convicted him of accepting.

Held, allowing the appeal and quashing the conviction:

(1) The sessions judge had rejected the testimony of the complainant regarding the alleged soliciting and should have then warned herself to what extent she could rely on those parts of the evidence relating to accepting.

(2) An appellant may have his conviction quashed if it was inconsistent with his acquittal on another count, if it could be demonstrated that the inconsistency was such that it would be unsafe to allow the conviction to stand.

(3) The alleged act of soliciting and that of accepting were so intermingled as to make it impossible to separate them. They depended on their proof upon the testimony of the same witnesses, which testimony should have been rejected. A witness cannot be regarded as worthy of credit at one moment and untrustworthy at another.

F [Bahasa Malaysia summary]

Perayu telah dituduh memujuk-rayu dan menerima suapan dalam kedudukannya sebagai seorang inspektor Lembaga Padi dan Beras. Keterangan utama terhadap perayu adalah daripada pengadu dan isterinya. Hakim mahkamah sesyen membebaskan perayu atas tuduhan memujuk-rayu tetapi mensabitkannya atas tuduhan menerima.

Diputuskan, membenarkan rayuan dan membatalkan sabitan:

(1) Hakim mahkamah sesyen telah menolak testimoni pengadu mengenai ujudnya pujuk-rayu dan sepatutnya memberi amaran kepada dirinya tentang setakat mana beliau boleh bergantung kepada bahagian keterangan yang berkaitan dengan penerimaan.

(2) Seorang perayu boleh mendapatkan sabitannya dibatalkan jikalau ianya tidak selaras dengan pembebasannya atas tuduhan lain, jikalau boleh ditunjukkan bahawa ketidakselarasan itu begitu sehingga ianya tidak selamat untuk membenarkan sabitan dikekalkan.

(3) Perbuatan memujuk-rayu yang dikatakan itu dan perbuatan menerima adalah begitu berkait sehingga adalah sukar untuk dipisahkan. Kedua-duanya bergantung kepada bukti atas testimoni saksi-saksi yang sama dan testimoni itu seharusnya ditolak. Seorang saksi tidak boleh dianggap sebagai boleh dipercayai pada satu ketika dan sebaliknya pada satu ketika yang lain.]